

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-213870

**DATE:** May 3, 1984

**MATTER OF:** Stimson Lumber Company

**DIGEST:**

1. GAO considers protest that firm that submitted incomplete bid bond with sealed bid in combined sealed bid-auction timber sale should have been permitted to cure the defect before the oral auction to come within the significant issue exception in GAO's Bid Protest Procedures for considering untimely bid protests.
2. The contracting officer in a combined sealed bid-auction timber sale, where only firms that submit acceptable sealed bids can participate in the subsequent oral auction, did not act unreasonably in excluding a bidder who submitted a defective bid bond with its sealed bid. While the officer could have delayed the oral auction to permit the firm to cure the defect, the firm never asked for a delay or suggested that it could cure in any reasonable time period.

Stimson Lumber Company protests the rejection of its sealed bid as nonresponsive under a combined sealed bid-auction timber sale conducted by the Forest Service, Siuslaw National Forest, Corvallis, Oregon. The bid was rejected because a power of attorney was not attached to the bid bond accompanying the bid. Although admitting that it did not submit its surety's power of attorney as required by the conditions of the sale, Stimson nonetheless urges that the Forest Service should have afforded it a reasonable opportunity to obtain an alternate form of acceptable bid guarantee. We deny the protest.

Sealed bids were opened on November 15, 1983. Under the combined sealed bid-auction procedure, which (apparently based on tradition) generally is used in western areas of the country, see Forest Service

Manual (FSM) § 2431.55 (February 2, 1981, amend. 123), the submission of an acceptable sealed bid is a prerequisite to participation in the auction. After the submission of sealed bids, which bind the bidders just as in any advertised procurement, FSM § 2431.59, the bids are publicly opened and posted. The oral bidding then begins at the highest posted sealed bid price. Id.

Stimson submitted the high sealed bid of \$150 per million board feet (MBF) of timber, followed by Fort Hill Lumber Company's sealed bid of \$115/MBF. If Stimson's bid had been acceptable, then the subsequent oral bidding would have started at \$150/MBF. However, the Forest Service rejected Stimson's sealed bid as non-responsive because the firm had failed to attach its surety's power of attorney to the bid bond. In that regard, the advertisement for sale instructed bidders that all sealed bids had to be accompanied by an "acceptable bid guarantee"<sup>1</sup> in the form of cash, a bid bond, an irrevocable letter of credit, certified check, bank draft, cashier's check or bank money order in the amount of 5 percent of the bid. Bidders were cautioned that failure to submit an acceptable bid guarantee would require rejection of the bid as nonresponsive unless there was no other acceptable bid. The advertisement instructions further cautioned bidders that bid bonds "must be accompanied by a power of attorney indicating that the person signing the bond for the surety has the power to do so."

According to the record, Stimson's representative at the sale was informed before the start of the auction that the firm's sealed bid was nonresponsive, thereby disqualifying the firm from participation in the oral bidding and any chance to receive the award, because the required surety's power of attorney was missing. The representative was apparently uncertain as to the nature

---

<sup>1</sup>The term "bid guarantee" refers to any firm commitment accompanying a bid as assurance that a bidder will, upon the government's acceptance of its bid, execute the necessary contract documents and submit any required performance bonds. Elevator Electric Corporation, B-213245, Oct. 25, 1983, 83-2 CPD ¶ 503; Federal Procurement Regulations § 1-10.102-2 (1964 ed.).

of a power of attorney document. After the bidding officer showed him a power of attorney accompanying the bid bond of another bidder, the representative made a statement to the effect that it was too late for him to go back to his vehicle to look for it. Fort Hill's offer of \$115/MBF was the remaining high qualifying bid because of Stimson's rejection. Fort Hill made the same bid during the auction, and because no higher oral bids were received, the Forest Service determined Fort Hill the awardee.

### Timeliness

The Forest Service contends that Stimson's protest, filed in our Office on December 6, 1983, was untimely filed and therefore should be dismissed without consideration, because it was not filed within 10 working days of the oral auction, when the basis for protest arose. See section 21.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. part 21 (1983). In response, Stimson points out that it sent a letter dated November 23 to the Forest Service Supervisor of the Siuslaw National Forest complaining that "[t]wo things bother us about what was done." Stimson suggests that this expression of dissatisfaction with what the agency had done was sufficient to constitute a timely protest to the contracting agency. In that event, the protest to our Office would have to have been filed within 10 working days after the Forest Service took adverse action on the November 23 letter, see section 21.2(a)(1) of our Procedures; in fact, the Forest Service only responded to Stimson's November 23 letter by letter dated December 7, setting forth its reasons for rejecting the firm's sealed bid.

We need not resolve the matter. Under section 21.2(c) of our Procedures, we will consider even an untimely protest on the merits if it raises an issue "significant" to procurement practices and procedures. In view of the nature of the procurement practices used in these types of timber sales, and in order to provide guidance to Forest Service officials in connection with future sales, we believe that exception to our timeliness rules should apply in this case.

### Merits

Stimson protests that it was improper for the Forest Service to reject its bid as nonresponsive without affording the firm a reasonable opportunity to cure

the defect by substituting another acceptable form of bid guarantee.<sup>2</sup> Stimson asserts that it could have secured a cashier's check from a local bank in the required amount within 15 minutes if indeed it had been given such an opportunity. Stimson points out that by not being allowed to participate in the auction, the government stands to lose \$329,000 in a sale involving 9,400 MBF of timber, representing the difference between its sealed bid of \$150/MBF and Fort Hill's successful oral bid of \$115/MBF.

In support of its position, Stimson principally relies on our decision in 51 Comp. Gen. 182 (1971), wherein we held that a high bidder's failure to submit a bid bond with its sealed bid under a combined sealed bid--auction timber sale was a minor informality which properly could be corrected before the oral bidding began. Stimson urges that the same rationale applies to the firm's situation in the present circumstance.

We agree with Stimson that our 1971 decision establishes that a defective bid guarantee in this type of sale can be cured before the oral bidding begins. In that decision, the high bidder did not submit any bid guarantee with its sealed bid; however, when this defect was made known to the bidder's representative, "he immediately produced a check which he gave to the Forest Service officer in charge of the oral bidding." *Id.* at 183. The bidding officer then called a brief recess to determine the acceptability of the check as a substitute bid guarantee. After the bidding officer made a positive determination to that effect, the high bidder was allowed to participate in the auction, eventually making the high oral bid as well.

That decision, however, was not intended to suggest that a contracting officer is obligated to delay the oral auction indefinitely to permit the negligent bidder to cure the bidding irregularity. As stated above, the

---

<sup>2</sup>In that regard, the Forest Service stated in its December 7 response:

"If your representative had provided the power of attorney when notified it was missing, the Forest Service would have included it with your bid."

bidder in the cited case, once the lack of a bid bond was noted, immediately produced an acceptable bid guarantee. Here, in contrast, Stimson's representative did not immediately furnish the omitted power of attorney, or request a recess to secure the document or an acceptable substitute for the incomplete bond. In fact, the Forest Service has furnished our Office with statements from three individuals present at the sale that Stimson's representative, when advised of the consequences of the missing power of attorney, simply said that he did not think he had time to go to his truck and look for it, and then took a seat. In this regard, we think it is immaterial for Stimson now to allege in hindsight that it could have secured a cashier's check<sup>3</sup> if given 15 minutes to do so--the fact is that the firm's representative made no such indication at the sale, and did not request a delay in starting the auction.

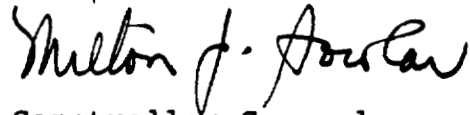
We have stated, in connection with the actual conduct of the auction, that a contracting officer should hold the auction open as long as any bidder expresses a desire to bid, since the underlying policy in the Forest Service regulations governing timber sales requires that every effort be made to secure for the government the best possible price. See Louisiana-Pacific Corporation, B-210904, Oct. 4, 1983, 83-2 CPD ¶ 415. The same policy supports the bidding officer's decision in 51 Comp. Gen. 182, supra, to include the bidder in the oral bidding. See Dickson Forest Products, Incorporated, B-191906(1), Nov. 1, 1978, 78-2 CPD ¶ 314. It does not, however, require that an agency afford the bidder an unrequested opportunity to cure a bidding defect that the bidder himself does not indicate is curable in any reasonable time period.

---

<sup>3</sup>We note that Stimson does not contend that the power of attorney was left behind in the representative's vehicle.

B-213870

Under the circumstances, we believe the contracting officer acted reasonably in proceeding with the auction without Stimson's participation. The protest is denied.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General  
of the United States